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No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

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ALEXANDER L. STEVAS,
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October Term, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH,
and TRUSTORS OF HERITAGE TRUST COMPANY

Petitioners

vs.

RELIANCE INSURANCE COMPANY and
JOHN R. BROMLEY

Respondents

ON WRIT OR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PLAINTIFF'S PETITION FOR WRIT

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A. QUESTIONS FOR REVIEW

1. Can a Federal Court remove a case from a State court on grounds of diversity of citizenship where plaintiffs and an indispensable defendant in the State Court Case are resident citizens of the same state?
2. Is a co-conspirator an indispensable defendant in a suit charging conspiracy against only two defendants?

B. DESIGNATION OF PARTIES

The caption of the case in this Court contains the names of all parties. (By local rule 21, the United States Court of Appeals for the Fifth Circuit excludes naming the United States District Court Judge in a petition for writ of mandamus to remand a case to the State Court - the Appeals Court proceeding sought to be reviewed herein, along with the Orders of the District Court.)

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E. REFERENCE TO OPINIONS IN COURTS BELOW

For the sake of brevity just one of three Orders of the United States District Court for the Southern District of Texas, Galveston Division, is being challenged herein. A copy of that Order - designated No. 2 - is reproduced as Appendix A. Plaintiffs' Rule 59(e) motion to alter or amend said Order is Appendix B. The District Court refused consideration of said motion, returning it unfilled.

The denials of plaintiffs' petition for mandamus and petition for rehearing and suggestion for rehearing en banc to the United States Court of Appeals for the Fifth Circuit were effected by check marks on a form, with no opinions, so are not reproduced.

A relevant opinion of the State Court from which the case was improvidently removed - the District Court for Galveston County, Texas - is reproduced as Appendix C with supporting memorandum.

F. STATEMENT OF JURISDICTIONAL GROUNDS

This petition is brought to review the July 29, 1983 denial by the United States Court of Appeals for the Fifth Circuit of petitioners' petition for writ of mandamus to the United States District Court for the Southern District of Texas, Galveston Division; to review the Appeals Court's Orders of September 19, 1983 denying rehearing and Rehearing En Banc; and to review the District Court's Order of June 29, 1983 denying petitioners' leave to amend their complaint and add an indispensable defendant, thereby denying petitioners' motions to dismiss and remand the case to the State Court.

The statutory provision believed to confer on this Court jurisdiction to review the orders of the District and Appeals Courts is 28 U.S.C. Sec. 1254 (1).

G. CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. Section 1441 Actions Removable Generally.

(a) . . .

(b) Any civil action of which the district courts have original jurisdiction founded upon a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the parties. Any other such action shall be removable only if none of the parties properly joined and served as defendants is a citizen of the State in which such action is brought. (Emphasis supplied). (Section 1441 is reproduced in full in Appendix D.)

Federal Rules of Civil Procedure. Rule 19. Joinder of Persons Needed for Just Adjudication.

(Rule 19 is reproduced in full in Appendix E).

Federal Rules of Civil Procedure. Rule 59. New Trials; Amendment of Judgment

(Rule 59 is reproduced in full in Appendix F).

28 U.S.C. Section 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of

Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

H. STATEMENT OF THE CASE

1. Material Facts

In 1972 one John R. Bromley collaborated with Reliance Insurance Company, a transnational conglomerate, to obtain a bonded insurance policy offering protection to investors in Bromley's company, Heritage Trust Company, an Arizona Corporation. The Reliance policy insured against losses from fraudulent or dishonest acts of Heritage employees. The policy was widely advertised and served to induce investors, most of them older citizens, to entrust their money to Heritage. Approximately twelve million dollars was lost out of more than one thousand "revocable intervivos trusts," the vehicle of the fraudulent scheme managed by Bromley.

On July 29, 1974, the S.E.C. filed a civil action in the United States District Court for the District of Arizona (S.E.C. v. Heritage Trust Co., John R. Bromley et al., 402 F. Supp. 744). In July, 1975, judgment for fraud was entered against Bromley, et al. (In March, 1983, Bromley, a citizen of Texas, was convicted of criminal fraud, sentenced to three years and placed on probation). Following the S.E.C. judgment, Robert and Claudia Hatch filed suit in the District Court of Galveston County, Texas against Heritage, Bromley, et al.

On March 5, 1976 judgment for fraud and violating twelve Texas statutes was granted to Mr. & Mrs. Hatch against Heritage, Bromley and other co-conspirators (Case No. 114,361 - District Court of Galveston County, Texas).

On April 16, 1976 Heritage Trust Co. was placed in receivership by the Superior Court of Maricopa County, Arizona. Almost none of the lost twelve million dollars was found in the assets of Heritage.

The Hatches garnisheed the debt of Reliance owed on the bonded insurance policy (Case No. 114,361A). The garnishment case was removed by Reliance by an interpleader action to the United States District Court in Phoenix. That Court denied the garnishment claim. Plaintiffs appealed to the Ninth CCA, then to the Supreme Court which denied their petitions for writ of certiorari (No. 81-1704), and reconsideration. The Arizona United States District Court dismissed them from the garnishment action. Reliance then quickly settled by making a small payment to the Receiver for Heritage, the other defendant party in that action. The Supreme Court's denial of plaintiffs' petition for rehearing, on June 3, 1982, was the final proceeding in the interpleader action.

Mr. & Mrs. Hatch then, on their own behalf and as representatives for all other defrauded trustors of Heritage, filed again in the Galveston County Court, charging conspiracy, an alternate claim reserved by plaintiff in the garnishment action; and charging abuse of process arising from acts by Bromley and by Reliance before, during and following the interpleader action. The new case was placed on the Galveston County Court 1982 docket as No. 123-723. It was determined by the State Court to be a supplement and continuation of the former action (114,361A) which had been dismissed for lack of prosecution,

without notice to plaintiff (Appendix C). Reliance again removed the cause to the Federal Court by petition for removal on grounds of diversity. The United States District Court for the Southern District of Texas, Galveston Division, in one of three Orders rendered on June 29, 1983, transferred the file to the United States District Court for the District of Arizona, prior to considering plaintiffs' Rule 59 motion to alter or amend and prior to plaintiffs' appeal to the United States Court of Appeals for the 5th Circuit, which peremptorily denied the appeal, and denied rehearing and suggestion for rehearing en banc. This petition for writ of certiorari is now submitted for review of one of the June 29, 1983 Orders by the United States District Court, it being unnecessary to take up this Honorable Court's time for consideration of the other errors in the District Court's findings.

2. Basis for Jurisdiction of Federal Court of First Instance

Petitioners believe the United States District Court for the Southern District of Texas improvidently removed this State Court case and has acquired no proper basis for jurisdiction. Had such removal been proper, jurisdiction would have to be remanded to the State Court originally acquiring jurisdiction, since the State Court plaintiffs and defendant John R. Bromley are citizens of the same state — Texas.

I. ARGUMENT

1. Errors in District and Appeals Courts Below

28 U.S.C. Sec. 1441 (b) provides that any civil action, other than one arising from the Constitution, treaties and Statutes of the United States, shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Plaintiffs in the improvidently removed State Court case - No. 123,723 in the District Court of Galveston County, Texas - are citizens of the State of Texas and were so at the time suit was commenced. There are two defendants in the State Court case: Reliance Insurance Company and John R. Bromley. The citizenship and principal place of business of Reliance was not stated in its petition to remove, as of the time the suit was commenced. By untimely amendment of its petition to remove, Reliance alleges that such citizenship and principal place of business of Reliance was in the State of Pennsylvania. The second defendant, John R. Bromley, is, and at the time of suit was, a citizen of Texas. Both defendants have been properly served and have filed answers. The answer of Reliance was filed in the Federal removal Court; that of Bromley was filed in the State Court. Plaintiffs' amendment of the State Court complaint was made prior to the amendment by Reliance of its Petition For Removal to state missing jurisdictional facts. Plaintiffs' amendment was not accepted by the Federal

Court, which removed the case and transferred it to the United States District Court for the District of Arizona. In his answer, Bromley contends he is not a party to the Federal action and that the Federal Court in Arizona now has jurisdiction and venue.

Rule 19 (a) of the Federal Rules of Civil Procedure provides that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party to the action if (1) in his absence complete relief could not be accorded among those already parties . . .

As plaintiffs will show, complete relief cannot be accorded to them in the absence of Bromley as a defendant.

Rule 19 (b) provides that if such a person (i.e., the person described in Rule 19 (a)) cannot be made a party, the court should dismiss the action, the absent party being regarded as indispensable.

The Courts below do not challenge the mandate to dismiss and remand stemming from Rule 19 (b). In its Order of June 29, 1983, Appendix A, the United States District Court for the Southern District of Texas, Galveston Division (the removal Court) states:

Plaintiffs propose to add Bromley, a Texas resident, as a co-conspirator . . .

Regarding the addition of non-diverse parties, if, on the one hand, they are indispensable parties, the Court must join them and remand would be proper (citations omitted). On the other hand, the Fifth Circuit has stated that joinder and remand of not indispensable parties is "clearly improper" (citations omitted). Thus

the critical question is whether Bromley is an indispensable party.

The Court then pronounces what plaintiffs will show to be an erroneous conclusion of law: "Co-conspirators are not indispensable parties" (citations analyzed herein below).

(Plaintiffs will show that an accurate statement of the law might be:- Co-conspirators are not indispensable parties if two or more co-conspirators remain as defendants in a case charging conspiracy.)

The Court then denied plaintiffs' motion to add John R. Bromley as party defendant . . . "unless prior permission of the court is obtained." (Prior permission was sought by plaintiffs' Rule 59(e) motion to alter or amend, timely filed with the Court. That motion was returned, unfiled and possibly unread, by the Clerk of the Court, contending that the file had been transferred to Arizona (the United States District Court for the District of Arizona). (Plaintiffs' motion to amend is reproduced as Appendix B.)

None of the three cases cited by the District Court in support of the conclusion that co-conspirators are not indispensable parties involved removal from the State Court, or FRCP Rule 19. In each case the defendants were arguing that Federal diversity jurisdiction did not exist since one or more possible non-diverse defendants were not joined or were dismissed from the complaint. In each case several diverse defendants were named or remained in the suit. Plaintiffs were attempting to preserve

Federal diversity jurisdiction. Defendants were seeking to defeat Federal jurisdiction. It was held that omitting the non-diverse defendants was within the right of a plaintiff to sue whom he chose.

The first citation by the District Court Judge is: *State of Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S. Ct. 716, 89 L Ed. 1051 (1945). In this case defendants, opposing Georgia's motion for an injunction against 23 railroad companies, two of which were Georgia citizens, argued that Supreme Court jurisdiction was lacking, since a State may not invoke such jurisdiction in a suit against its own citizens; and contended that a suit against several defendants is improper if any of them, being necessary party defendants, are citizens of the State. The Court held that not all conspirators are necessary parties defendant in a suit to enjoin a conspiracy, saying, "If either of the defendants who assert this defense is a citizen of Georgia and is a necessary party, leave to file would have to be denied . . . In suit to enjoin a conspiracy not all of the conspirators are necessary parties defendant . . . The citizenship of the two defendants may be challenged by motion to strike . . . But if they are stricken, the Court would not lose original jurisdiction over the controversy between Georgia and the other defendants."

The second citation by the District Court Judge is: *Herpich v. Wallace*, 430 F. 2d 792 (5th Circuit, 1970). Once again, this case does not involve Federal diversity jurisdiction in a removal case. Defendants argue that plaintiff should join two parties whom plaintiff does not

wish to join, or the suit should be dismissed. Defendants contend the two parties are indispensable for them to defend against charges of violation of the Securities Exchange Act. The Appeals Court held, as to joining the two parties to the other defendants, they "do not appear to be so situated that disposition of this action might as a practical matter impair or impede their ability to protect the interests defendants claim they might have . . . joint tort feasons or conspirators are not persons whose absence from a case will result in dismissal for nonjoinder." (If the two parties had been named as the only party defendants, they, of course, would have been indispensable to a charge of conspiracy).

The third case cited by the District Court Judge is: Professional Life Insurance Co. v. Roussell, 528 F. Supp. 391, (D. Kan. 1981). One of several defendants claimed the suit should be dismissed because of an absence of diversity jurisdiction between one of the defendants and the plaintiff. Plaintiff amended his complaint to remove the non-diverse defendant. The Court held the dismissed defendant was not indispensable. The particular dismissed defendant was merely one of several co-conspirators; the diverse defendants remained in the case. Their presence as diverse co-conspirators justified Federal jurisdiction over plaintiff's cause of action for conspiracy, which requires at least two parties defendant in accordance with the age-old rule that a person cannot commit conspiracy by himself.

2. Each of Two Co-conspirators Is an Indispensable Party

The rule that two parties are indispensable defendants in an action for conspiracy goes back to the Middle Ages and is put forth rather recently in Blackstone's Commentaries, 1765 - 1769 A.D. (Univ. of Chicago Press Facsimile, Vol. 3, p. 126): ". . . the law has given a very adequate remedy by the action of conspiracy, which cannot be brought but against two at least . . ."; and Vol. 4, p. 136: ". . . there must be at least two to form a conspiracy . . ."

The most recent reported case found by plaintiffs is *James R. Smith, M.D., et al. v. Northern Michigan Hospitals, Inc., et al.*, C.A. 6th Circ., 703 F 2d 942,951 - decided March 25, 1983 - holding ". . . It is recognition of this need which forms the basis for the rule that since a corporation cannot combine or conspire with itself, the acts of a corporation acting through its directors, officers and employees are not generally subject to condemnation under Section 1."

The law that two persons are indispensable as defendants in an action for conspiracy is so firmly established that, as in the *James R. Smith* case supra, even the joining of additional parties defendant such as employees of the principal defendant corporation does not meet the two-party test unless the additional parties are separate, independent entities.

It is ironic that the United States Court of Appeals for the Fifth Circuit, which sustained the ruling by the District Judge in the case sub judice, is the author of what is considered the leading case requiring dismissal of a complaint for conspiracy against a corporation where the complaint does not name another independent co-conspirator. In *Nelson Radio v. Motorola, Inc., et al.*, 200 F 2d 911, cert. denied 83 S. Ct. 783, 345 U.S. 925, 97 L. Ed. 1356, 5th Circ. 1952, the Court held, "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can . . ."

The Nelson Radio opinion is cited and followed as the law in eleven circuits throughout the United States. It is also the substantive law in the State of Texas, which law it is the duty of the Federal Court to follow (*Pullman v. Jenkins*, 305 U.S. 534, 59 S. Ct. 347, 83 L. Ed. 334).

A 1977 Texas case cites precedents in five different United States Courts of Appeal, including Nelson Radio, for the same rule of law. The case is *Christopher v. General Computer Systems, Inc.*, 560 SW 2d 698, C.A. Dallas, 1977, reh denied, On Motion for Rehearing:

"We agree with the decision cited by appellant to the effect that a corporation cannot conspire with itself, no matter how many of its agents may participate in the corporate action. *Worley v. Columbia Gas of Kentucky*, 491 F 2d 256, 261 (6th Cir 1973); *Dorsey v. Chesapeake & Ohio Ry.*, 476 F 2d 243, 245 (4th Cir 1973); *Pearson v.*

Youngstown Sheet & Tube Co., 332 F 2d 439, 442 (7th Cir 1964); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911, 914 (5th Cir 1952) cert. denied 345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356, (1953) . . . We accept also the rulings of certain Federal trial courts construing the Sherman Anti-Trust Act as requiring that a conspiracy in restraint of trade be shown by a concert of action between more than one individual person. *Knutson v. Dailey Review, Ind.*, 383 F Supp 1346, 1359 (N.D. Cal. 1974) modified 548 F. Supp 1346 (9th Cir 1977); *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp 388, 396 (D. Md. 1950) affirmed 189 F 2d 797 (4th Cir 1951)."

Other cases in accord with Nelson Radio are: *U.S. v. Alvarez*, 610 F 2d 1250, on rehearing, 625 F 2d 1196 (C.A. Fla. 1980); *U.S. v. Graves*, 669 F 2d 964 (C.A. Tex. 1982); *Dossuoy v. Gulf Coast Invest. Corp.*, 660 F 2d 594 (C.A. La. 1981); *U.S. v. Lowry*, 456 F 2d 341 (C.A. Tex. 1972); *Richardson v. Chrysler Motors Corp.*, 257 F. Supp. 547 (D.C. Tex. 1966); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103 (D.C. Tex. 1960); *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F 2d 646 (C.A. Tex. 1977); *Hatley v. American Quarter Horse Assoc.*, 552 F 2d 646 (C.A. Tex. 1977)' *Donaldson v. Werblow* (N.D. Tex. 1953) 140 F. Supp. 244.

The Texas law defining conspiracy is stated by the Texas Supreme Court in *Great National Life Ins. Co. v. Chapa*, 377 SW 2d. 632: Conspiracy is "a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means."

In accord with that definition and with *Christopher v. General Computer Systems, Inc.* (supra), the Texas State Court properly permitted plaintiffs to amend their complaint to add Bromley as an indispensable party to the alleged conspiracy.

Under the rule dealing with necessary joinder of indispensable parties, the indispensability of parties depends upon State law. (*Kroese v. General Steel Castings Corp.*, C.A. 1950. 179 F2d 760 - citing 3 *Ohlinger's Federal Practice* 355 et seq. (1948), cert denied, 70 S. Ct. 1026, 339 U.S. 983, 94 L. Ed. 1386; *Dunham v. Robertson*, C.A. Wyo. 1952, 198 F 2d 316; *Jones Kettering Corp. v. A.M. Puller & Co.*, D.C. N.Y. 1970, 50 F.R.D. 311; *Baker v. Rosenbaum's Estate*, D.C. Puerto Rico 1972, 58 F.R.D. 496; *Schwenn v. Pamida*, D.C. Wyo. 1975, 392 F. Supp. 69; *Inland Western Inv. Co. v. Winkler Realty Corp.*, D.C. N.Y. 1975, 65 F.R.D. 515; *Wright Farms Cosntruction, Inc. v. Kreps*, D.C. Vt. 1977, 444 F. Supp. 1023; *CBS, Inc. v. Film Corp. of America*, D.C. Pa. 1982, 545 F. Supp. 1382; *Challenge Homes, Inc. v. Greater Naples Care Center, Inc.*, C.A. Fla. 1982, 669 F 2d 667., in which the court states that the term "indispensable party" is merely a conclusion arrived at after completing the analysis in this rule; only when a court finds that a person is one who should be joined but cannot be and that the litigation cannot go forward without the missing person is the term "indispensable" appropriate.

In every jurisdiction we have found, if a plaintiff brings an action for conspiracy against just one conspirator the case will be dismissed for failure to name a second co-conspirator (e.g., *Black v. Vaeth*, 285 N.Y.S. 2d 557, N.Y.

1967; *Smith v. Town of Proviso*, 301 N.E. 2d 145, Ill. 1973). A plaintiff may sue a single party for the wrongful tort committed by that party, but he may not sue one party alone for conspiracy to commit that tort. "An allegation that two defendants conspired is necessary to subject to liability those defendants who did not directly participate in the commission of overt acts." (*Singer v. Singer*, 14 N.W. 2d 43). Also, an allegation of conspiracy "may be pleaded and proved only in aggravation of the wrong of which plaintiff complains, or for the purpose of enabling him to recover against all of the conspirators as joint tortfeasors, or for the purpose of holding one defendant responsible for the acts of his co-conspirators." (*State of Missouri ex rel and to Use of Devault v. Fidelity & Casualty Co. of N.Y., C.A., Mo.*, 107 F 2d 343, 348).

In affirming the Fifth Circuit case of *Pinkerton v. U.S.*, 151 F 2d 499, the Supreme Court made the essential distinction between a suit for a wrongful act and a suit for conspiracy to perform the wrongful act: "The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses, and a substantive offense is not merged in the conspiracy." (328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489).

In *Ianelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975), the Supreme Court quoted a 1949 opinion of Justice Jackson: "The basic rationale of the law of conspiracy is that conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish."

It is also well-established that an injured party may choose to sue for joint recovery, rather than suing for the wrongful act alone (in which case a joint tort feisor would not have to be named): *Mecom v. Fitzsimmons Drilling Co.*, 248 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233; *Cincinnati R. Co. v. Bohon*, 200 U.S. 221, 26 S. Ct. 166, 50 L. Ed. 448.

3. Conclusion

In conclusion, plaintiffs' cause against defendants for conspiracy cannot proceed against Reliance unless the second co-conspirator, Bromley, is joined as has been done by plaintiffs' amended complaint in the State Court. Neither plaintiffs nor defendants can waive the jurisdictional requirements of Federal Courts. Reliance cannot be shown to be the principal perpetrator and executor of the fraudulent securities and real estate transactions; and cannot be sued alone for such frauds. Yet the entire fraudulent scheme can be proved at trial to have been made possible by Bromley's well-advertised assurances to the public that their investments were protected by insurance against losses due to fraudulent or dishonest acts. Bromley is the only individual who negotiated with Reliance and was explicitly named as covered in applications for the policy.

We realize the burden upon this great Court. We have read that only 200 cases can be reviewed annually out of 5,000 submitted. Our petition for certiorari is not a life-or-death criminal matter. But it does represent the last chance for approximately 800 older American citizens, many of whom have already died since this effort began

eight years ago, to recover their life savings, a total of twelve million dollars. What more can we do if plaintiffs' petition is denied?

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, et al

Plaintiffs

CIVIL ACTION

v.

No. G-82-358

RELiance INSURANCE COMPANY

Defendant

ORDER (No. 2)

BEFORE THE COURT is plaintiffs' motion to amend their complaint. The proposed second amended complaint seeks to add a non-diverse party defendant and to allege causes of action which are not in contempt of court order. Defendant is opposed to plaintiffs' attempt to add the non-diverse party.

Heritage Trust Co. (Heritage) was an investment trust company, owned and controlled by John R. Bromley and his wife. In the early '70's, Reliance Insurance Co. (Reliance) issued a bond to Heritage, agreeing to indemnify Heritage for losses due to Heritage employee dishonesty. When claimants, such as the Hatch plaintiffs, filed competing claims to the bond money, Reliance filed an interpleader action in Arizona federal court. As part of the interpleader, the Arizona district court permanently enjoined the prosecution or institution of actions relating to Reliance's issuance of its bond. Although the

interpleader was dismissed in 1982, the Arizona court found portions of the original complaint filed herein in contempt of its injunction.

This action was filed in state court and removed to this Court which has subject matter jurisdiction by virtue of diversity of citizenship. Plaintiffs are Texas residents and defendant Reliance Insurance Company is a Pennsylvania corporation.

Plaintiffs propose to add Bromley, a Texas resident, as a co-conspirator. As justification for the addition, plaintiffs assert they can obtain his testimony more easily if he is a party than if he is not.

The original complaint, in those counts not in contempt of the Arizona court order, alleged against Reliance that an interpleader action filed by Reliance was an abuse of process, that Reliance conspired with Heritage to defraud Heritage investors, and that Reliance negligently issued its bond of indemnification to Heritage. In their proposed amended complaint, plaintiffs have alleged only those counts; thus in that respect, the Court finds the amendment proper.

If a removed lawsuit comes within a federal court's subject matter jurisdiction when it is removed, a plaintiff generally is not allowed to change his petition to defeat jurisdiction. See St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938) (jurisdictional amount). See generally 14 Wright & Cooper, Federal Practice & Procedure 3723, at 598-99 (1976).

Regarding the addition of non-diverse parties, if, on

the one hand, they are indispensable parties, the Court must join them and remand would be proper. See Jeff v. Zink, 362 F. 2d 723, 726 (5th Cir.), cert. denied, 385 U.S. 987 (1966); Hilton v. Atlantic Richfield, 327 F. 2d 217, 219 (1964). See Stanhope v. Ford Motor Credit Co., 483 F. 2d 275, 277 (W.D. Ark. 1980). On the other hand, the Fifth Circuit has stated that joinder and remand of not indispensable parties is "clearly improper." In re Merrimack Mutual Fire Insurance Co., 587 F. 2d 642, 647 (5th Cir. 1978). Accord 1A Moore, Federal Practice 10.161(1), at 209 (2d ed. 1982). Thus, the critical question is whether Bromley is an indispensable party.

Co-conspirators are not indispensable parties. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 463 (1945); Herpich v. Wallace, 430 F. 2d 792, 817 (5th Cir. 1970); Professional Investors Life Insurance Co. v. Roussel, 528 F. Supp., 391, 404 (D. Kan. 1981).

As an alleged conspirator, Bromley is not indispensable; hence, jurisdiction having been properly established in this Court, the Court finds that joinder of Bromley and the resulting remand would be improper. Thus, in this respect, the Court finds the proposed amended complaint improper.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiffs' motion to amend is GRANTED in part and DENIED in part; plaintiffs' motion to add John R. Bromley as party defendant is DENIED; plaintiffs' motion to amend the complaint so that it comports with the prior court order is GRANTED; and plaintiffs have ten (10) days to file an amended complaint without adding parties

defendant, unless prior permission of the Court is obtained.

DONE at Galveston, Texas, this the 29th day of June,
1983.

(Signed) HUGH GIBSON

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
GALVESTON DIVISION

ROBERT C. HATCH and
CLAUDIA R. HATCH, and
TRUSTORS OF HERITAGE
TRUST COMPANY,

C.A. No. G-820-538

Plaintiffs,
vs.
RELiance INSURANCE CO.
ET AL.,
Defendants

MOTION TO RECONSIDER
AND TO ALTER OR AMEND
ORDER NO. 2
(GRANTING PART AND
DENYING PART OF
PLAINTIFFS' MOTION
TO AMEND)

NOW COME plaintiffs herein and respectfully move this Court to alter or amend the above-referenced Order No. 2 after reconsideration of the findings of fact and conclusions of law set forth in said Order. Page numbers from Order No. 2 are referred to below to guide the Court to the most significant findings and conclusions which plaintiffs believe to be in error:

Page 1. Order No. 2 correctly finds that John R. Bromley and his wife owned and controlled Heritage. Plaintiffs' charge of conspiracy in this cause is not against Heritage, the defunct corporation. It is a charge that

Bromley and Reliance conspired together causing losses to trustors. At trial on the merits plaintiffs will show that the Reliance bonded insurance policy was intended to assure potential trustors that their investments were well protected against fraud or dishonesty.

Page 2, 1st paragraph. Order No. 2 correctly states that this action was filed in state court, but plaintiffs contend it has not been properly removed by virtue of diversity of citizenship. The statement that plaintiffs are Texas residents and defendant Reliance Insurance Company is a Pennsylvania corporation is not a finding of diverse citizenship as required by statute. Reliance is a billion-dollar wholly owned and controlled subsidiary of a New York holding company, which is solely owned by an aggrandizing family which bought the old 1890's Reliance Insurance Company in 1968 (changing the name of the holding company from "Leasco" to "Reliance"). In January, 1982 the family picked up outstanding minority shares in the holding company by the payment of \$550,000,000—thus converting it to a solely owned private corporation. (Moody's Bank & Financial Manual, Vol 2, 1982). The consolidated corporation consists of the holding company which wholly owns and controls Reliance Financial Services which wholly owns and controls Reliance Insurance Company, which wholly owns and controls United Pacific Insurance Company. (Dun and Bradstreet's - Dun's Marketing Services - Million Dollar Directory, Vol I, 1982). As stated in Best's Insurance Reports, 1982, Reliance is a consolidated group or fleet.

Plaintiffs in their State court petition identify Reliance as "a consolidated corporation residing in the State of Texas, a commercially domiciled citizen of Texas." That Reliance is a consolidated corporation has never been denied by defendant.

Page 2, 2nd paragraph. Plaintiffs have added Bromley, a Texas resident citizen, as an indispensable co-conspirator. Not only will his testimony be more easily obtained and have the added force of testimony by a party, the charge of conspiracy can only be brought against two or more persons. Plaintiffs direct the Court's attention to pp. 4 through 9 of their June 3, 1983 Memorandum of Points and Authorities, and to pp. 4 through 10 of plaintiffs' Response of June 23, 1983, attached and made a part of plaintiffs' "In General" Motion to Alter or Amend, transmitted herewith.

Page 2, 3rd paragraph. Plaintiffs' complaint is misstated in Order No. 2. The abuse of process count is set forth on page 4 of the Motion to Alter or Amend Order No. 1, transmitted herewith. The conspiracy count does not charge conspiracy with Heritage, but with Bromley and other officers of Heritage.

Page 2, last paragraph. We agree that remand is proper - in fact, is mandated - if an indispensable non-diverse party is added by amendment to a cause of action.

Page 3, top. In the Merrimack case cited in Order No. 2, the Court permitted, subsequent to removal, amendment to add two additional persons as defendants and affirmed remand to the State Court by the District

Court. Merrimack held that Section 1447 (c) allows remand since diversity was lost after the two resident defendants were added (please see pp. 5 and 6 of plaintiffs June 3, 1983 Memorandum of Points and Authorities). (And p. 5 of plaintiffs June 23, 1983 Response).

Page 3, 2nd paragraph. Two of the three cases cited in Order No. 2 have been previously distinguished from the case of Hatch v. Reliance. Neither of them concerned removal or remand. Georgia v. Penn Railroad Co., 324 U.S. 439 (1945), and Herpich v. Wallace, 430 F. 2d 792 (5th Cir. 1970) are well-analyzed in plaintiffs' Response of June 23, 1983 pp. 5, 6 and 7—attached as a part of plaintiffs' "In General" Motion submitted herewith. In Penn. Railroad Justice Douglas wrote, ". . . not all the conspirators are indispensable parties defendant." In Herpich it was held, where there were several defendants, that two parties who were not joined as defendants were not indispensable in considering dismissal for non-joinder.

The third case on the issue, cited in Order No. 2 for the first time, is: Professional Investors Life Insurance Co. v. Roussel, 528 F. Supp. 391 (Kansas D.C. 1981). Once again, there are several co-conspirators. Plaintiff had dismissed one of them - a resident defendant - to preserve diversity. Defendants moved that therefore all remaining defendants should be dismissed. The Court upheld the plaintiff's right to remove to preserve diversity, relying on Miller v. Leavenworth-Jefferson Electric Corp., 653 F. 2d. 1378 (10th Cir. 1981), which was not a conspiracy case, so the presence of the party was not required under Rule 19 and Court could dismiss under Rule 21 to preserve diversity.

If this Honorable Court can show plaintiffs one case of conspiracy which does not include as defendants two or more conspirators, plaintiffs may be able to discover how, in any court, they can win their count of conspiracy against Reliance without adding the indispensable second co-conspirator, John R. Bromley. (As of the date of this motion, plaintiffs are advised that citations on Bromley have been issued; one has been returned from his last known address; the other, we believe has been served, but we do not yet have verified evidence that Bromley has received it).

In conclusion, plaintiffs believe the 5th Circuit opinion in Bobby Jones Garden Apts. v. Suleski, 301 F 2d 172, applies to this case. It is a Texas suit involving Texas law to be determined by a Texas court. The Texas law defining conspiracy is stated by the Texas Supreme Court in Great National Life Ins. Co. v. Chapa, 377 SW2 632: Conspiracy is "a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means."

Plaintiffs appreciate the grant of that part of their amendment which again complies with the purging in their cause of the questionable counts in their Original Petition. (Plaintiffs believe that their amended petition properly filed in the State Court before the arguable amendment of defendant's defective petition for removal was filed on June 29, 1983 accomplished such compliance).

But plaintiffs would appreciate even more - and do strongly urge - that, on reconsideration, Order No. 2 be

amended to grant plaintiffs' motion in full by accepting the amended petition as filed in the State court against the conspirators, Reliance and John R. Bromley.

Respectfully submitted,

July 11, 1983

By: (Signed)

Robert B. Cumming

Attorney for Plaintiffs

383 N. Roberts Way

Camano Island, WA 98292

(206) 387-9603

APPENDIX C

STATE OF TEXAS
COUNTY OF GALVESTON

ROBERT C. HATCH and CLAUDIA	No. 123,743
R. HATCH; and TRUSTORS OF	and
HERITAGE TRUST COMPANY,	No. 114,361-A
Plaintiffs,	IN THE DISTRICT COURT
vs.	OF GALVESTON COUNTY
RELIANCE INSURANCE CO.	TEXAS
Defendant.	212th JUDICIAL DISTRICT

ORDER

This matter is before the court on motion by plaintiffs to confirm jurisdiction of this court in this cause. An effort has been made by a defective petition for removal filed by defendant to remove this cause from this state court to the United States District Court for the Southern District of Texas, Galveston Division. The cause has not been properly removed.

Following hearing, the court finds that the record of this case and the petition for removal contain no facts supporting transfer of this cause to the federal court. The filing of a notice of removal does not operate to deprive this court of its original jurisdiction, since the cause, reset as No. 123,723, is the same cause as No. 114,361 A, arising from the same transaction alleged throughout proceedings in this court initiated on March 30, 1977 and still pending.

As previously ordered by the court, Case No. 114,361 A was, through error, placed on the drop docket, and through error, was dismissed without notice to plaintiffs. Files of the ongoing action have been consolidated by this court, but out of respect for the federal court the two cases are being heard and litigated separately until that court removes or remands Case No. 123,723.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

Defendant's petition for removal of this case does not remove jurisdiction of this cause from this court inasmuch as it was not filed within thirty days of service of process on defendant on or about April 1, 1977.

Signed DON B. MORGAN

Judge

MEMORANDUM IN SUPPORT

1. 76 C.J.S. Section 221, p. 1086: ". . . The question of whether the record, as it existed at the time of filing the petition, showed on its face that the cause was removable having been one for the state in the first instance, and removability having been tested solely by the complaint and the petition for removal, a mere ex parte inspection of the record by the judge of the court to determine whether, on its face, the suit appears to be removable was sufficient."
2. 76 C.J.S. section 222, p. 1092: "The giving of notice of intention to remove did not operate as a transfer of jurisdiction from the state court to a federal court."
3. "This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record of the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not, in law, shown to the (state) court that it cannot proceed further with the cause . . . Having once acquired jurisdiction, the court may proceed until it is judicially informed that its powers have been suspended." (*Phoenix Ins. Co. v. Pechner*, 95 U.S. 183, 24L. Ed. 427).
4. If upon face of record, including petition for removal, a case does not appear to be a removable one, then state court is not bound to surrender its jurisdiction. (*F & L Drug*

Corp. v. Amer. Cent. Ins. Co., D.C. Conn. 1961, 200 F. Supp 718).

5. When garnishment proceedings are first instituted after rendition of judgment, in aid of execution, the garnishee's right to remove depends upon whether the garnishment action is an independent suit, since for removal purposes an action must be independent, not supplementary. (Overman v. Overman, D.C. Tenn. 1976, 412 F. Supp. 411). In Texas, garnishment is not an independent "civil action"; it is an ancillary proceeding because it must be based upon a valid unsatisfied judgment and execution. No. 114,361-A is ancillary to Case No. 114,361, in execution of that valid unsatisfied judgment.

6. Possession of res (garnishment bond debt) vested court which first acquired jurisdiction with power to adjudicate controversy, whether court took possession of specific property or not. (Pac. Tel & Tel. Co. v. Star. Publ. Co., D.C. Wash, 1924 S F. 2d 151). Although garnishment is no longer an issue in this case, due to federal ruling, jurisdiction was acquired of the garnishment res, other claims than garnishment were reserved by plaintiffs and are properly before this court which originally acquired jurisdiction. See p. 2, Supplemental Memorandum in support of Summary Judgment, dated July 12, 1977, Case #114,361-A.: "Plaintiffs' claims as third party beneficiaries, as cestui que trust and as persons injured by negligence and/or conspiracy by Reliable are not waived and are specifically reserved. . ."

7. Absent diversity of citizenship and a federal question,

redress for an intentional tort must be sought in state courts. (*Weyant v. Mason's Stores Inc.* D.C. Pa. 279 F. Supp. 283).

8. Diversity of citizenship must exist at time of filing original action as well as at time of petitioning for removal. (*Rodrigues v. Continental Oil Co.*, D.C. Tex., 1971, 334 F. Supp. 656. Also 258 F. Supp. 780; and 256 F. Supp. 25).

9. For case to be removed from state court, federal court must possess prima facie jurisdiction from removal petition alone. (*Electronic Data Systems Corp. v. Kinder*, D.C. Tex. 1973, 360 F. Supp. 1044, affirmed 497 F.2d 222).

10. "A petition for removal, when presented to the state court becomes part of the record of that court and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends (*Powers v. Chesapeake R. Co.*, 18 S. Ct., 169 U.S. 92, 42 L. Ed. 673).

11. In petition for removal it is not sufficient to allege in terms that the case is removable . . . or otherwise to rest the right of removal on mere legal conclusions, but there must be a statement of facts relied upon and not otherwise appearing . . ." (*Heckeman v. Yellow Cab Transit Co.*, D.C. Ill. 1942, 45 F. Supp. 948). This case quoted the Supreme Court case of *Chesapeake & Ohio R. Co. v. Cockrell*, 1913, 232 U.S. 146, 34 S. Ct. 278, 58 L. Ed. 544).

12. In *Carlton Properties Inc. v. Crescent City Leasing Corp.*, D.C. Pa., 1962, 212 F. Supp. 370 (cited in plaintiff's motion to remand and copy of opinion attached to plaintiff's second motion to remand, previously submitted to this court

for informational purposes) the opinion quotes from the 1889 U.S. Supreme Court case of *Jackson v. Allen*, 132 U.S. 27, at p. 34, 10 S. Ct. 9, 33 L. Ed. 249 as to the principal "citizenship of the parties at the commencement of the actions, as well as at the time the petitions for remand were filed, was not sufficiently shown and that therefore the jurisdiction of the state court was never divested. This being so, the defect cannot be cured by amendment. *Crehore v. Ohio & Miss. Railroad Co.*, 131 U.S. 240, 9 Sup. Ct. Rep. 692."

13. The Carlton court continued, "Following the oral argument defendant presented a motion for leave to amend the petition for removal in the particulars noted. Since the petition for removal failed to allege a necessary jurisdictional fact, we have no jurisdiction in this matter except to declare our want of jurisdiction. A different question would have been presented if the petition to amend had been filed within the statutory time . . . within twenty days after the service of summons on the defendant." In the *Hatch v. Reliance* case, summons was served on August 11, 1982; the effort by defendant to amend is dated February 26, 1983 (the statutory period has been enlarged to thirty days, rather than twenty days).

14. The defendant in Carlton contends that a 5th CCA case permits amendment. The Carlton court distinguished amendment for more technical defects imperfectly cited, from jurisdictional defects, where no allegation of citizenship was made as of the time of filing the original suit, citing *F & L Drug and Browne v. Hartford Fire Ins.*

Co., 168 F. Supp. 796, which in turn cites two U.S. Supreme Court opinions - 191 U.S. 78, 48 L. Ed., 24 S. Ct.; and 169 U.S. 92, 18 S. Ct. 264, 42 L. Ed. 673.

15. 76 C.J.S. Section 240, p. 1106-7: "If, however, the court's jurisdiction was in fact lacking at the time of removal, and no right existed, any action in proceedings by such court looking toward a determination of the controversy are of no force or effect and any findings or orders made by it, other than an order to remand, are null and void."

APPENDIX D

DISTRICT COURTS; REMOVAL OF CASES
FROM STATE COURTS**Sec. 1441. Actions removable generally.**

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(As amended Oct. 21, 1976, Pub. L. 94-583, Sec. 6, 90 Stat. 2898).

APPENDIX E**RULE 19.****Joinder of Persons Needed for Just Adjudication**

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed,

the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

APPENDIX F

RULE 59.

New Trials; Amendment of Judgments

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

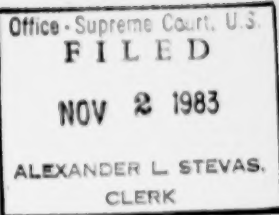
(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966).

No. 83-644

IN THE
SUPREME COURT OF THE
UNITED STATES



October Term, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH,
and TRUSTORS OF HERITAGE TRUST COMPANY

Petitioners

vs.

RELIANCE INSURANCE COMPANY and
JOHN R. BROMLEY

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PLAINTIFFS' SUPPLEMENTAL APPENDIX
TO PETITION FOR WRIT

Robert B. Cumming
383 N. Roberts Way
Camano Island, WA 98292
(206) 387-9603

Attorney for Petitioners

SUPPLEMENTAL APPENDIX

ORDERS OF THE UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

(Case No. 83-2433)

GILBERT F. GANUCHEAU
CLERKUNITED STATES COURT OF APPEALS
FIFTH CIRCUITOFFICE OF THE CLERK
600 Camp Street
New Orleans, LA 70130

COMM.	FTS
(504)589	682

CASE INQUIRIES	
East. & Mid. LA	6194
No. & West TX	4167
So. & East TX	6131
MS, Agency & West LA	3892
Other	6514

July 29, 1983

MEMORANDUM TO COUNSEL
OR PARTIES LISTED BELOW:No. 83-2433 - IN RE: ROBERT C. HATCH, ET AL.,
(Dist. Ct. No. G-82-358)

The following action has been taken in the above case:

- ☐ AN EXTENSION OF TIME has been granted to and including:
- ☐ for filing appellant's/petitioner's brief
 - ☐ for filing appellee's/respondent's brief
 - ☐ for filing reply brief.

☐ for filing petition for rehearing.

☐

☐ Motion to consolidate granted.

☐ Motion to supplement or correct the record granted.

☐ Motion for leave to file supplemental brief granted.

☐ Motion for leave to file brief amicus curiae is granted.

☐ Joint motion as to time for filing briefs granted.

☒ Order enclosed has been entered.

☐

GILBERT F. GANUCHEAU, Clerk

Hon. Hugh M. Gibson
cc: Mr. Robert B. Cumming
Mr. David E. Warden
Mr. John R. Bromley, Jr.
Mr. Jesse E. Clark, Clerk

By: (signed) Sarah L. Holmes
Deputy Clerk

MOT-2

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals

FILED

Jul 29, 1983

Gilbert F. Ganucheau

Clerk

No. 83-2433

IN RE:

ROBERT C. HATCH, ET AL.,

Petitioners.

On Petition for Writ of Mandamus to the United
States District Court for the Southern District
of Texas

Before CLARK, Chief Judge, RUBIN and GARWOOD,
Circuit Judges.

B Y T H E C O U R T:

IT IS ORDERED that the petition for writ of
mandamus is **DENIED**.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals

FILED

Sep 19, 1983

Gilbert F. Ganucheau

Clerk

No. 83-2433

IN RE:

ROBERT C. HATCH, ET AL.,

Petitioners.

On Petition for Writ of Mandamus to the United
States District Court for the Southern District
of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC

(Order July 29, 1983, 5 Cir., 198 , F.2d)
(September 19, 1983)

Before CLARK, Chief Judge, RUBIN and GARWOOD,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel for Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE

(signed) Charles Clark
United States Circuit Judge

REHG-6

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals

FILED

Oct 17, 1983

Gilbert F. Ganucheau

Clerk

 No. 83-2433

IN RE:

ROBERT C. HATCH, ET AL.,

Petitioners.

 Appeal from the United States District Court for
 the Southern District of Texas

O R D E R :

☒ The motion of petitioners
 for ☒ stay ☐ recall and stay of the issuance of the
 mandate pending petition for writ of certiorari is
 DENIED.

☐ The motion of petitioners
 for ☒ stay ☐ recall and stay of the issuance of the
 mandate pending petition for writ of certiorari is
 GRANTED to and including _____,
 the stay to continue in force until the final disposition
 of the case by the Supreme Court, provided that within
 the period above mentioned there shall be filed with
 the Clerk of the Court the certificate of the Clerk
 of the Supreme Court that the certiorari petition has
 been filed. The Clerk shall issue the mandate upon
 the filing of a copy of an order of the Supreme Court
 denying the writ, or upon the expiration of the stay
 granted herein, unless the above mentioned certificate
 shall be filed with the Clerk of this Court within that
 time.

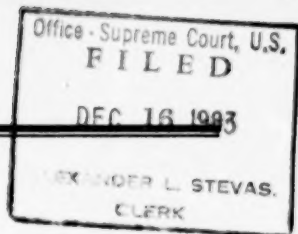
- ☐ The motion of _____
for a further stay of the issuance of the mandate is
GRANTED to and including _____,
under the same conditions as set forth in the preceding
paragraph.
- ☐ The motion of _____
for a further stay of the issuance of the mandate is
DENIED.

(signed) Charles Clark
UNITED STATES CIRCUIT JUDGE

MDT-4

The foregoing Supplemental Appendix is respectfully submitted by attorney for petitioners.

Robert B. Cumming
383 N. Roberts Way
Camano Island, WA 98292
(206) 387-9603



NO. 83-644

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH, and
TRUSTORS OF HERITAGE TRUST COMPANY
Petitioners,

v.

RELIANCE INSURANCE COMPANY and
JOHN R. BROMLEY
Respondents.

**RESPONDENT RELIANCE INSURANCE
COMPANY'S BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

STEPHEN G. TIPPS
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BAKER & BOTTS
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*Attorneys for Respondent
Reliance Insurance Company*

QUESTIONS PRESENTED FOR REVIEW

1. Is an alleged co-conspirator an indispensable party under Rule 19, Federal Rules of Civil Procedure?
2. May a federal court which attained jurisdiction of a case by removal from a state court on the basis of diversity of citizenship deny plaintiffs' motion for leave to amend their complaint to add a non-diverse party defendant if that party defendant is not an indispensable party to the action?
3. Is mandamus the appropriate remedy to obtain appellate review of a district court's denial of leave to amend a complaint to add a new party defendant?

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NO. 83-644

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT C. HATCH, CLAUDIA R. HATCH, and
TRUSTORS OF HERITAGE TRUST COMPANY
Petitioners,

v.

RELIANCE INSURANCE COMPANY and
JOHN R. BROMLEY
Respondents.

**RESPONDENT RELIANCE INSURANCE
COMPANY'S BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

Respondent Reliance Insurance Company requests that the Petition for Writ of Certiorari in this matter be denied.

STATEMENT OF THE CASE

This case involves an alleged civil conspiracy to defraud. It was brought by Petitioners Hatch (plaintiffs below) against Respondent Reliance Insurance Company ("Reliance") in a Texas state court, but was removed to

federal court on the basis of diversity of citizenship. The case arrives at this Court by way of Petitioners' application for writ of mandamus to reverse the order of the District Court denying leave to add a non-diverse party defendant, alleged to be a co-conspirator with Reliance. The Fifth Circuit Court of Appeals refused to issue a writ of mandamus.

Petitioners have wholly failed to sustain their burden of establishing any reason why this Court should grant review on certiorari, as set forth in Rule 17, Rules of the Supreme Court of the United States. Alleged co-conspirators are not indispensable parties and the District Court properly denied the motion to add a new party defendant. Further, mandamus does not lie to review a district court's decision to refuse amendment to add a party defendant.

While this case was filed in August, 1982, the events giving rise to it occurred much earlier, in the early 1970's, and have already been the subject of substantial prior litigation. The Petition for Writ of Certiorari contains gross mischaracterizations and misstatements of fact regarding the history of this matter and the proceedings below, requiring Reliance to set out here a full description of the case prior to presenting its specific arguments in opposition to the Petition.

I. Events and Proceedings Prior to the Filing of the Instant Action

Respondent Reliance issued a commercial blanket fidelity bond in the penal amount of one million dollars (\$1,000,000.00) to Heritage Trust Company, then known as Federal Trust Company ("Heritage"), in Arizona on December 15, 1972. This bond remained in force and

effect until August 15, 1974, at which time it was cancelled. By this bond, Reliance agreed to indemnify Heritage for losses to Heritage, which losses were occasioned by fraudulent or dishonest acts of covered employees. The bond was not intended to, and does not, provide coverage running to the investors or trustors of Heritage or other third parties.

At all times material to this litigation, Heritage was owned and controlled by John R. Bromley and his wife, Bertha. Heritage was, at all relevant times, an Arizona corporation with its principal place of business in Arizona. After cancellation of the bond by Reliance, more than 40 lawsuits were brought in various jurisdictions against Heritage and its principal officers, the Bromleys. The lawsuits uniformly sought recovery of funds against Heritage and the Bromleys on the basis of various allegations sounding in fraud. Reliance was not a party to any of these lawsuits and had no notice or knowledge of them. No claim was asserted against the aforementioned bond in any of these actions.

One of these lawsuits against Heritage was brought on December 16, 1975, by Robert and Claudia Hatch in the 56th Judicial District of Galveston County, Texas. The Hatches had entrusted an amount of approximately \$11,000 to Heritage to invest and manage for them in high-yield, capital-growth investment ventures. When the Hatches sued in Galveston County, service upon Heritage and its officers was made by service of a summons and complaint on the Secretary of State of Texas, pursuant to the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2039b. Neither Heritage nor the Bromleys appeared to defend this action, and, in fact, have asserted that they

never had any notice of the Texas action. On March 5, 1976, the Hatches obtained a default judgment against Heritage and its officers in the Texas court in the sum of \$129,972.22. Reliance was not a party to this Texas action and had no knowledge of it. The Texas lawsuit made no claim against or mention of the Reliance bond.

On April 16, 1976, the Superior Court of Arizona, Maricopa County, pursuant to Section 6-865, Arizona Revised Statutes, appointed the Arizona State Superintendent of Banks as Receiver for Heritage Trust Company and authorized the Receiver to obtain possession and control of the assets of Heritage. In conjunction with that receivership, the Arizona court entered an order staying all persons and their attorneys from commencing, prosecuting, continuing or enforcing any proceeding against Heritage or its assets, and further enjoining such persons from causing to be executed any execution or other process for the purpose of impounding or taking possession of or interfering with, or creating or enforcing a lien upon any property owned by or in possession of the Receiver of Heritage. On July 26, 1976, the Receiver filed an action in the Superior Court of Arizona against Reliance, seeking to recover, in his capacity as Receiver for Heritage, the full penal sum of the bond based upon the alleged fraudulent and dishonest acts of the Bromleys. This was the first attempt by anyone to assert a claim against the bond, and the first action involving Heritage of which Reliance had notice or was a party.

In March, 1977, eight months after the Receiver filed his lawsuit against Reliance, the Hatches initiated a garnishment action in Texas against Reliance by which they sought payment of their \$129,972.22 default judgment

against Heritage from the bond proceeds. This matter was assigned Cause No. 114,361-A in the District Court of Galveston County, Texas.

On November 15, 1977, as a result of the two inconsistent claims against the prospective bond proceeds, Reliance instituted an action in the nature of interpleader in the United States District Court for the District of Arizona, in which Reliance sought a determination of the respective parties' right and entitlement, if any, to the proceeds of the commercial blanket bond issued by Reliance to Heritage.

In conjunction with the prosecution of the action in the nature of interpleader, the United States District Court for the District of Arizona, on March 6, 1978, entered its Order Granting Permanent Injunction and Requiring Interpleader by which it permanently enjoined and restrained, *inter alia*, Robert C. and Claudia R. Hatch, from

instituting or prosecuting in any State court, or in any United States court, any suit or proceeding on account of or pertaining to the liability of Reliance Insurance Company on account of the issuance of its bond number B 729077 to Heritage Trust Company, or from continuing with the prosecution of any action or any proceedings already instituted or commenced against the plaintiff, Reliance Insurance Company, in relation to such bond. . . .

See Appendix A.

On August 8, 1979, the Hatches filed a motion entitled Motion for Declaratory Judgment in the interpleader action seeking a ruling that, by reason of their Texas garnishment, they had priority over the claims of all other

unsecured creditors to any funds found owing from Reliance to Heritage by virtue of the bond. The Arizona District Court determined that the Hatches had no priority claim to the funds and denied their motion by order of February 6, 1980, as amended on March 20, 1980. The Hatches then moved the District Court for a new trial, which motion was denied by order dated March 10, 1980. The Hatches appealed, and oral argument was presented to the United States Court of Appeals for the Ninth Circuit on October 15, 1981. On November 5, 1981, the Ninth Circuit issued its Memorandum Opinion unanimously affirming the order below. The Hatches moved for rehearing *en banc*, which was denied on December 23, 1981.

The Hatches then sought intervention and reversal by this Court, by Petition for Writ of Certiorari dated March 12, 1982. That Petition was denied by order dated May 3, 1982, and the Hatches' petition for rehearing by this Court was denied on June 7, 1982.

After entry of the final order of the United States Court of Appeals for the Ninth Circuit, but during the appellate proceedings conducted in this Court, the United States District Court for the District of Arizona, having determined that Robert C. and Claudia R. Hatch did not have any priority claim to the bond proceeds, if any, and that, therefore, the Hatches had no claim to the bond proceeds other than as general creditors, entered its order on January 12, 1982 terminating further participation in the interpleader action by Robert C. or Claudia R. Hatch.

During the processing of the Hatches' appeals, the underlying action in the nature of interpleader was proceeding toward trial, which had been scheduled for March

30, 1982. Numerous status conferences were held with the Receiver and a lengthy and detailed pretrial order was filed in the United States District Court for the District of Arizona. The Hatches' interest, along with the interest of all other general creditors, was of course represented by the Receiver. The matter of the Receiver's right and entitlement, if any, to the bond proceeds was fully and finally resolved prior to trial, and the interpleader action was dismissed with prejudice on February 24, 1982.

II. Proceedings in the Instant Case

After settlement and dismissal of the Receiver's case against Reliance and after denial of the Hatches' Petition for Writ of Certiorari in this Court, the Hatches then filed the instant case on August 5, 1982 in the District Court of Galveston County, Texas, 212th Judicial District, where it was assigned Cause No. 123,723. Service was made on Reliance's registered agent in Texas on August 11, 1982, and on September 7, 1982, the case was removed to the United States District Court for the Southern District of Texas, Galveston Division on the basis of diversity of citizenship, where it was assigned Cause No. G-82-358.¹ Petitioners Hatch are citizens of

1. Petitioners Hatch complained that Reliance's petition for removal, and the amendments thereto, were defective, and that removal was improper. The specific complaint was that Reliance's petition for removal did not expressly state the citizenship of Reliance at both the time of removal and the date the lawsuit was filed, a time span of about three weeks. Reliance maintained that the original petition for removal and the pleadings then on file made it obvious that diversity of citizenship existed at all relevant times. This is not a question presented for review in the instant Petition, and, moreover, after full briefing and oral argument on the Hatches' motion for remand the United States District Court for the Southern District of Texas, Galveston Division ruled that removal was proper and retained jurisdiction of the case.

the State of Texas, while Respondent is and has been at all relevant times a citizen of the State of Pennsylvania, having been incorporated in Pennsylvania since March 27, 1820 and having always maintained its principal place of business in Pennsylvania.²

On November 30, 1982, Reliance moved the District Court for the Southern District of Texas, Galveston Division to transfer venue of this action under 28 U.S.C. § 1404(a) to the United States District Court for the District of Arizona. The reasons for the requested change of venue were: that all transactions and events giving rise to the Hatches' complaint took place in Arizona; that all prior judicial proceedings involving Reliance in the subject transactions took place in the interpleader action in Arizona; that most of the fact witnesses resided in Arizona; and, finally, that the convenience of the parties and witnesses, the location of books and records, and the interests of justice all weighed heavily in favor of transfer. After full briefing and oral argument, Reliance's motion for change of venue was granted on June 29, 1983. The case currently resides on the docket of the United States District Court for the District of Arizona where it bears Cause No. CIV-83-1266-PHX-WPC.

In ancillary proceedings in the United States District Court for the District of Arizona, Reliance Insurance Company filed a petition for order to show cause why

2. It is important to note that the *only defendant* in this action at the time of removal was Reliance Insurance Company. In addition, although the Hatches' attorney, Mr. Cumming, has chosen to style this action to include "trustors of Heritage Trust Company" no class has ever been identified and no effort has been made to certify any class.

the instant case filed by the Hatches in Texas in 1982 was not in contempt of the permanent injunction entered in the interpleader action. The court ordered that the Hatches and their attorney, Mr. Robert B. Cumming, appear for hearing on the matter, and hearings were held before the Honorable Valdemar A. Cordova on January 12, 1983 and April 25, 1983. After the second hearing the court ruled that several of the causes of action set forth in the instant lawsuit were in contempt of the permanent injunction and ordered that the Hatches amend their complaint to remove those causes of action. It was after the first contempt hearing on January 12 that Mr. Cumming began a flurry of activity in the Texas state court, flagrantly ignoring the rules of procedure and disregarding any precept of an orderly and efficient handling of the litigation.

Following the January 12 hearing on the contempt matter in Arizona, the Hatches filed a pleading entitled Plaintiffs' First Amended Original Petition on January 26, 1983 in Cause No. 123,723 in the Texas state court, even though the matter had been removed to the federal court six months earlier. This amended pleading did not remove the causes of action that were later ruled to be in contempt of the interpleader injunction, nor did it add any party defendant.

Next, on March 28, 1983, continuing to ignore the jurisdiction of the federal court over the instant case, the Hatches filed a pleading entitled Motion to Confirm Jurisdiction and Declare Interpleader Bond with Surety Void in Cause No. 123,723 in the 212th District Court of Galveston County, Texas. On April 4, 1983 a hearing was held, over Reliance's objections, in the Texas state

court, ostensibly regarding that motion, and several orders were entered.³

One of the April 4 orders reinstated on the docket Cause No. 114,361-A, the original garnishment action against Reliance filed in 1977, which had been dismissed for lack of prosecution on January 26, 1981.⁴ Another of the orders declared the bond filed by Reliance in November, 1977 when it instituted the interpleader in the United States District Court for the District of Arizona void *ab initio* and, therefore, that the Arizona court never had jurisdiction of the garnishment action, Cause No. 114,361-A. Finally, another of the April 4 orders ruled that Cause No. 123,723 (the instant case) was a continuation of Cause No. 114,361-A (the garnishment case), and that removal had, therefore, been improper because more than thirty days had elapsed between the filing of the petition for removal (in Cause No. 123,723) and service of process on Reliance in April, 1977 (in Cause No. 114,361-A). See Petition for Writ of Certiorari, Appendix C.

Reliance then filed a motion for reconsideration of the orders entered on April 4, 1983 in the state court. A hearing was held on April 18, 1983, after which the

3. The hearing was held despite the fact that on November 23, 1982 a notation was made on the docket sheet of the 212th District Court of Galveston County, Texas for Cause No. 123,723 which reads as follows:

This cause having been removed to the United States District Court for the Southern District of Texas, Galveston Division, as evidenced by copy of the petition for removal filed with the Clerk of this Court, it is ordered that this Court should proceed no further herein unless this case is remanded.

4. No motion had been made for reinstatement, as is required by Rule 165a, Texas Rules of Civil Procedure. Further, pursuant to Rule 165a the court was without jurisdiction even to consider reinstatement, the matter having been dismissed over two years earlier.

Honorable Don B. Morgan reversed his order reinstating Cause No. 114,361-A, deciding that the language of Rule 165a, Texas Rules of Civil Procedure, was clear in providing no discretion for the court to reinstate a case after the passage of more than six months from the date the case was dismissed. Since the garnishment case, Cause No. 114,361-A, was now officially off of the court's docket, and the instant case, Cause No. 123,723, had been removed to the federal court as Cause No. G-82-358, there were no active cases on this matter in the state court. As a result, the other orders entered by the state court with respect to these cases at a time when that court did not have jurisdiction over them are null and void.⁵

On June 17, 1983 the Hatches filed a motion for leave of court to file an amended complaint in Cause No. G-82-358 in the federal court, and attached to that motion a pleading entitled Plaintiffs' Second Amended Original Petition, which was styled to be filed in Cause No. 123,723 in the state court. It is in this Second Amended Original Petition that the Hatches first attempt to add John R. Bromley, now a resident of Texas, as a party defendant in this action.⁶

On June 29, 1983 the Honorable Hugh Gibson, United States District Judge of the District Court for the Southern

5. See, e.g., *National S.S. Co. v. Tugman*, 106 U.S. 118 (1882); *Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962).

6. It should be noted that Petitioners attempted to add Bromley as a party defendant in Cause No. 114,361-A by an amendment to the petition in that case shortly after it was reinstated on April 4, 1983. However, service of that amended petition was never made on Mr. Bromley, and, in any event, within two weeks time the court had reversed itself on the order reinstating that case.

District of Texas, Galveston Division ordered that the Hatches' motion to amend was granted insofar as necessary to allow them to remove the causes of action found in contempt of the interpleader injunction, but was denied with respect to adding John R. Bromley as a party defendant. See Petition for Writ of Certiorari, Appendix A.⁷ On that same day, in separate orders, the District Court denied the Hatches' motion for remand and granted Reliance's motion for change of venue to Arizona.

Subsequent to the above described proceedings, the Hatches applied to the Fifth Circuit Court of Appeals for a writ of mandamus directing Judge Gibson to allow them to add John R. Bromley as a party defendant, which was denied. Petitioners' request for rehearing *en banc* regarding the writ of mandamus was also denied. Petitioners now seek the intervention and reversal by this Court, by Petition for Writ of Certiorari docketed on October 17, 1983.⁸

SUMMARY OF ARGUMENT

One of the causes of action set forth in the Hatches' complaint is that Reliance conspired with John R. Bromley to defraud the Hatches by inducing them to invest

7. This Respondent has no knowledge of whether the Hatches ever filed their amended complaint in the federal court, but it appears that the amended complaint adding John R. Bromley as a party defendant was filed in the state court in Cause No. 123,723 and served upon John R. Bromley, because he answered that complaint in the state court on July 14, 1983.

8. Respondent received notice of the Petition for Writ of Certiorari on November 7, 1983, and subsequently filed for and was granted an extension of time within which to file a brief in opposition to the Petition for Writ of Certiorari to and including December 19, 1983.

their money in a trust scheme set up by Heritage Trust Company. The crux of Petitioners' argument at this point in the proceedings is that they should be allowed to amend their complaint in the federal court to add John R. Bromley as a party defendant because he is an alleged co-conspirator with Reliance, and as such, their argument goes, he is an indispensable party to the litigation as that term is used in Rule 19, Federal Rules of Civil Procedure. The practical effect of adding Bromley, a Texas citizen, as a party defendant at this time would be to destroy the basis for federal jurisdiction and force remand of the matter to the Texas state court.

The United States District Court for the Southern District of Texas, Galveston Division ruled that Bromley as an alleged co-conspirator was not an indispensable party under Rule 19, and, therefore, denied Petitioners' motion to amend their complaint to add Bromley as a party defendant. On application for writ of mandamus the Fifth Circuit Court of Appeals agreed, and denied the writ.

Respondent Reliance's argument is three-fold: (1) Bromley as an alleged co-conspirator is not an indispensable party under Rule 19; (2) the District Court's decision was proper and the only course of action possible; and (3) mandamus does not lie to obtain appellate review of a district court's decision to refuse amendment to add a party defendant.

ARGUMENT

I. Alleged Co-Conspirators are not Indispensable Parties under Rule 19

This case arrives at this Court by way of Petitioners' application for writ of mandamus to review the order of

Judge Gibson denying leave of court to add Bromley as a party defendant. Rule 19, Federal Rules of Civil Procedure, governs the determination of whether or not Bromley is indispensable, but in this diversity action where the question of indispensability depends upon substantive law, the Texas law of civil conspiracy prescribes the substantive law on which the Rule 19 decision is based. *Challenge Homes, Inc. v. Greater Naples Care Center*, 669 F.2d 667 (11th Cir. 1982); *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3rd Cir. 1950).

Many courts have noted that the term "indispensable party" is a conclusion arrived at after completing the analysis in Rule 19. Only when a court finds that a person is one who should be joined but cannot be and that the litigation cannot go forward without the missing person is the label "indispensable" appropriate. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968); *Schutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970). The relevant parts of Rule 19 state as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process *and whose joinder will not deprive the court of jurisdiction over the subject matter of the action* shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties. . . .

* * *

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. *The factors to be considered by the court include: first, to what*

extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(Emphasis added.)⁹

Bromley is obviously not a person to be joined if feasible as set forth in Rule 19(a) because his joinder would destroy diversity and thus deprive the district court of jurisdiction. Thus, the factors set forth in Rule 19(b) must be considered to determine if Bromley is an indispensable party. None of those factors would compel the court to dismiss the action if Bromley could not be joined: a judgment rendered in Bromley's absence will not be prejudicial to Bromley or any other party; and any judgment rendered pursuant to the law of civil conspiracy in Texas will be the same whether Bromley is a party to this action or not.¹⁰

In Texas, civil conspiracy is defined as a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. It is not the agreement itself, but an injury to the plaintiff resulting from an act done pursuant to the common purpose that gives rise to the cause of action. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922

9. The full text of Rule 19 is set forth in Appendix B.

10. The same holds true under the law of civil conspiracy in Arizona. *Consolidated Tungsten Mines, Inc. v. Frazier*, 348 P.2d 734 (Ariz. 1960).

(Tex. 1979); *Great National Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964). In order for there to be a conspiracy, some act must be committed, which if done alone, would give rise to a cause of action. *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963). Civil conspiracy is a tort in which each of the members of the conspiracy are joint tortfeasors, each conspirator being jointly and severally liable for the total sum of damages resulting from the conspiracy. *Mims v. Bohn*, 536 S.W.2d 568 (Tex. Civ. App.—Dallas 1976, no writ); *Massey v. Farnsworth*, 353 S.W.2d 262 (Tex. Civ. App.—Houston [1st Dist.] 1961), *rev'd on other grounds*, 365 S.W.2d 1 (Tex. 1963).

The law of torts in Texas is consistent with that in most other jurisdictions in that when two or more persons jointly engage in the commission of a tort, such as civil conspiracy, they are jointly and severally liable and the injured person may sue all of them jointly, as many of them as he sees fit, or just one of them. In any event the injured party may obtain a judgment for the full amount of his damages. *Gulf, C. & S.F.R. Co. v. James*, 10 S.W. 744 (Tex. 1889); *Kress (S.H.) & Co. v. Selph*, 250 S.W.2d 883 (Tex. Civ. App.—Beaumont 1952, writ *ref'd n.r.e.*).

Bromley, therefore, is not an indispensable party to this action. The conclusion that co-conspirators are not indispensable parties has been reached by this Court and by courts in many other jurisdictions. *See State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) ("In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant." *Id.* at 463); *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970) ("Rule 19, as amended in 1966, was not meant to unsettle the well-established

authority to the effect that joint tortfeasors or coconspirators are not persons whose absence from a case will result in dismissal for nonjoinder." *Id.* at 817.); *Picking v. Pennsylvania R. Co.*, 152 F.2d 753 (3rd Cir. 1945); *Professional Investors Life Ins. Co., Inc. v. Roussel*, 528 F.Supp. 391 (D. Kan. 1981); *Carl Gutmann & Co. v. Rohrer Knitting Mills*, 86 F.Supp. 506 (E.D. Pa. 1949) (where the court refused to join an alleged conspirator to defeat federal diversity jurisdiction).

Petitioners do not cite a single case from Texas, or from any other jurisdiction, which supports the position that a co-conspirator is an indispensable party to a case alleging conspiracy.¹¹ Petitioners have apparently confused the allegations one must make in a complaint to support a cause of action of conspiracy with the requisites of an indispensable party under Rule 19. This seems apparent from the fact that the great bulk of the cases cited in the Petition for Writ of Certiorari are cases wherein the allegation of conspiracy was made but there

11. The only case that even remotely supports Petitioners' view is *Black v. Vaeth*, 285 N.Y.S.2d 557 (City Court of Utica, Oneida County 1967). In *Black* the plaintiff alleged a conspiracy against two defendants who were husband and wife. The court held that conspiracy had not been properly alleged because there must be at least two conspirators and for these purposes a husband and wife were deemed a single entity. Then the court went on to make what appears to be an incorrect or mistaken statement: "[t]herefore, the plaintiff's charges of conspiracy must fail, not only because of lack of proof but because of her failure to include the other alleged conspirator as a party in this action." *Id.* at 563. This statement is supported by citation to *Bereswill v. Yablon*, 160 N.E.2d 531 (N.Y. 1959), which, however, does *not* support the proposition that all conspirators must be *parties to the action*. Undoubtedly what the *Black* court meant to state was that the cause of action of conspiracy cannot be maintained unless there are at least two independent entities conspiring. In any event, the case is certainly of little, if any, precedential value in a situation governed by Texas law.

was no allegation that there were two or more conspirators. Clearly, in cases such as that the cause of action must fail on its face.

Petitioners have missed entirely the principle of law that allows a party to sue any one tortfeasor from among a group of alleged joint tortfeasors for the entire amount of damages suffered. Thus, while one may not prove a conspiracy without showing that two or more people were involved, one need not sue more than one of the conspirators in order to recover damages sustained by that conspiracy. This rule of law is beneficial to plaintiffs in that it allows persons injured by joint tortfeasors to obtain a judgment against and full compensation from any of the joint tortfeasors, without being forced to go to the expense and trouble of filing suit against all of them.

II. The District Court correctly refused to add Bromley as a Party Defendant

There is no disagreement between Petitioners and Respondent that if Bromley as an alleged co-conspirator was deemed an indispensable party to this litigation that the District Court should add Bromley as a party defendant and, thereafter, remand the case to the Texas state court since there would no longer be complete diversity of citizenship among the parties. Indeed, Judge Gibson in his order of June 29, 1983 set forth precisely that proposition. *See* Petition for Writ of Certiorari, Appendix A. *See also Jett v. Zink*, 362 F.2d 723 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966).

The District Court correctly ruled that Bromley was not an indispensable party, and thus leave to amend and

remand to the state court was not required. Moreover, upon finding that Bromley was not indispensable, the District Court did not even have the authority to allow amendment to add him as a party because such would have divested the court of its jurisdiction.

The instant case was properly and timely removed to federal court on the basis of diversity of citizenship pursuant to 28 U.S.C. §§ 1332 & 1441. To allow Petitioners to defeat the jurisdiction of the federal court by attempting to add a party who is not indispensable would violate the general rule established by this Court that a plaintiff cannot by his own actions, such as amending his pleadings, defeat jurisdiction that has validly attached.¹² *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Further, this Court more recently held that 28 U.S.C. § 1447(c) states the *exclusive* grounds on which a remand order may be based. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

Section 1447(c) allows remand only if "the case was removed improvidently and without jurisdiction. . . ." Since Bromley is not an indispensable party a remand of the case may not now be forced by the District Court granting Petitioners' motion to add Bromley as a party. Remand by that avenue would be outside the scope prescribed by 28 U.S.C. § 1447(c), and would be an improper divestiture of jurisdiction. By moving to add Bromley as a defendant, Petitioners were actually requesting the District Court to destroy its own power to adjudicate the case. *See Faser v. Sears, Roebuck & Co.*, 674 F.2d 856, 859 (11th Cir. 1982); *In re Merrimack Mutual Fire Ins. Co.*, 587 F.2d 642, 646-47 (5th Cir. 1978).

12. Jurisdiction of the federal court attaches at the moment the petition for removal is filed in the state court. 28 U.S.C. § 1446(e).

III. Mandamus is not the appropriate remedy to review the District Court's Decision

The use of the writ of mandamus as a means for immediate appellate review is severely restricted, and is oftentimes unavailable even when it can be shown that a district court actually has erred. Generally, the writ will issue only in situations where it is necessary to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a clear duty to do so. Even in those cases the writ will not issue if the complaining party has an adequate remedy by appeal or otherwise. *Roche v. Evaporated Milk Association*, 319 U.S. 21 (1943); *Ex parte Chicago, R. I. & Pacific R.*, 255 U.S. 273 (1921). The standard for the use of mandamus as a remedy, therefore, is very strict, and is aptly stated as follows:

The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error.

American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3rd Cir. 1953).

There do not appear to be many cases on point, but all cases found by Respondent indicate that mandamus would not issue to review an order by a district court denying leave to amend a complaint to join a new defendant. *In re Arthur Anderson and Co.*, 621 F.2d 37

(1st Cir. 1980); *In re Cessna Distributorship Antitrust Litigation*, 532 F.2d 64 (8th Cir. 1976); *Hartford Fire Ins. Co. v. Herrald*, 434 F.2d 638 (9th Cir. 1970); *D'Ippolito v. Cities Service Co.*, 374 F.2d 643 (2d Cir. 1967). Indeed, in situations involving the diversity jurisdiction of a federal court this Court has very narrowly prescribed the use of mandamus only to review district court remand orders which on their face state openly that the court relied on a non-Section 1447(c) ground for remand. *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

The instant case presents no such extraordinary situation demanding immediate appellate review by way of mandamus. The federal court properly retained jurisdiction of the case and Petitioners are not prevented from pursuing any of their valid causes of action and litigating this cause on the merits.

CONCLUSION

The District Court properly analyzed and applied the law to this case. The Court of Appeals affirmed. There exists no error of fact or law. Petitioners have wholly failed to sustain their burden of establishing, pursuant to Rule 17, Rules of the Supreme Court of the United States, that there exists "special and important reasons" why the writ should be granted. Contrary to the protestations of Petitioners, the decisions below were controlled by and applied well settled legal principles, and did not involve any important question of law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a

manner in conflict with applicable decisions of this Court or of any other Court of Appeals on the same matter. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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December 15, 1983

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE)	
COMPANY, a corporation,)	
)	Civ. 77-843 PHX WEC
Plaintiff,)	
)	
vs.)	
)	ORDER GRANTING
RICHARD W. KOEB, as)	PERMANENT IN-
Receiver for Heritage Trust)	JUNCTION AND
Company; ROBERT C.)	REQUIRING
HATCH and CLAUDIA)	INTERPLEADER
R. HATCH, his wife; and)	
WALTER C. MADSEN,)	
Superintendent of Banks,)	
State of Arizona,)	
)	
Defendants.)	
)	

This matter having come on regularly for hearing on the Court's Order for Issuance of Process, Injunction Against Interpleaded Claimants, and Hearing, dated the 1st day of November, 1977, requiring the defendants and each of them, to appear and show cause, if any they have, why they should not be required to interplead their claims in and to the sum deposited by plaintiff with the Registry of this Court, and why the temporary injunction heretofore issued by this Court should not be made permanent.

And it appearing to the court that:

(1) The Court has jurisdiction of this cause under Title 28, U.S.C.A., Section 1335, to grant the relief requested.

(2) This is an action in the nature of Interpleader commenced under and by virtue of 28 U.S.C.A., Section 1335, the statutory requisites thereof having been duly satisfied.

(3) The court's temporary injunction was duly entered pursuant to 28 U.S.C.A., Sections 1335 and 2361.

(4) The Court's order of November 15, 1977, dissolving the temporary injunction was entered without proper notice to opposing parties and an opportunity to be heard.

NOW, THEREFORE, IT IS ORDERED that the Court's Order of November 15, 1977, dissolving the temporary injunction may be, and the same is hereby vacated, and it is further

ORDERED that the defendants, and each of them, are hereby permanently enjoined and restrained from instituting or prosecuting, in any State court or in any United States court, any suit or proceeding on account of or pertaining to the liability of the Reliance Insurance Company on account of the issuance of its Bond No. B 729077 to Heritage Trust Company, or from continuing with the prosecution of any actions or any proceedings already instituted or commenced against the plaintiff, Reliance Insurance Company, in relation to such bond, and

IT IS FURTHER ORDERED that the defendants and each of them be and they are hereby required to interplead and relitigate among themselves and with plaintiff their claims in and to the sum of ONE MILLION DOL-

LARS (\$1,000,000.00) evidenced by the Bond on Interpleader heretofore delivered by plaintiff to the Clerk of this Court.

DONE IN OPEN COURT THIS 6th day of March, 1978.

/s/ WALTER E. CRAIG
Walter E. Craig
United States District Judge

APPENDIX B**Rule 19, Federal Rules of Civil Procedure.*****Joinder of Persons Needed for Just Adjudication***

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other

measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

APPENDIX C

Title 28, United States Code, § 1447.

Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.